



483.70 Administration: Binding Arbitration Agreements



*Division of Nursing
Homes*

Hello. I am Dara Graham, nurse consultant with Division of Nursing Homes. I will be conducting this presentation which provides training for the two new Long Term Care requirements, F847 Binding Arbitration Agreements, and F848 Arbitrator and Venue Selection and Retention of Agreements. These two requirements has been effective since September 16, 2019. For detailed information about these new requirements, please refer to Appendix PP.

Overview

- Requirements F847 and F848
- Intent
- Definitions and interpretive guidance (IG)
- Investigative protocol
- Guidance on review of plan of correction (POC)

In this presentation, I will provide an overview of the requirements, intent, interpretive guidance, investigative protocol and plan of correction for F847 and F848..

LTC Regulatory Group

§483.70 Administration

- F847 Binding Arbitration Agreement
- F848 Arbitrator/Venue Selection and Retention of Agreements

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Starting on September 16, 2019, the requirements for F847 and F848 were added under Administration, §483.70. Let us briefly go through the requirements.

F847 Binding Arbitration Agreements

§483.70 (n)

- *The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission or as a requirement to continue to receive care.*
- *(2) (i) The facility must ensure that the agreement is explained in a form and manner that he or she understands and the resident or his or her representative acknowledges that he or she understands the agreement;*

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Under F847, there are 5 key components that the facility must comply with if they choose to offer the resident or his or her representative to enter into an agreement for binding arbitration.

First, the facility cannot require the resident or his or her representative to sign the agreement as a condition of admission or as a requirement to continue receiving care in the facility.

Second, the facility must explain the agreement in a form and manner that the resident or his or her representative can understand. Also, the resident or his or her representative acknowledges that they understand the agreement.

F847 Binding Arbitration Agreements

§483.70 (n)

- (3) must explicitly grant the right to rescind the agreement within 30 calendar days of signing it.
- (4) must explicitly state that neither the resident nor his or her representative is required to sign an agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.
- (5) may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials

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Third, the agreement must clearly state that the resident or his or her representative has the right to rescind the agreement within 30 days after signing it.

Fourth, the agreement must clearly state that the resident or his or her representative is not required to sign the agreement as a condition of admission or as a requirement to continue receiving care in the facility.

Lastly, the agreement may not contain any language to prohibit or discourage anyone including the resident or his or her representative to communicate with federal, state or local officials including State Long-Term Care Ombudsman.

F848 Arbitrator/Venue Selection and Retention of Agreements

§483.70(n)

(2) *The facility must ensure that:*

- (iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and*
- (iv) The agreement provides for the selection of a venue that is convenient to both parties.*

(6) *When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute and be available for inspection upon request by CMS or its designee.*

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Under F848, there are 2 key components:

First, the agreement must provide for the selection of a neutral arbitrator agreed upon by the facility and the resident or his or her representative and the selection of a venue that is convenient to both parties.

Second, the facility must retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision for 5 years after the facility and the resident or his or her representative resolved a dispute through arbitration.

Intent of §483.7(n) Requirements



- To ensure that long-term care facilities give residents or their representatives a choice in whether or not to enter into a binding arbitration agreement.
- To provide a neutral and fair arbitration process.
- Ensure facilities retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision.

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After reviewing the requirements, let's talk about the intent.

It is the resident or his or her representatives right to make informed decisions and choices about important aspects of *resident's* health, safety and welfare. The requirements of F847 and F848 are to assure the use of a binding arbitration agreement is voluntary and must be clearly communicated to the residents or their representatives as optional and not required as a condition of admission or to continue to receive care at the facility.

For the resident or his or her representative who entered into a binding arbitration agreement, it is important to ensure there is a neutral and fair arbitration process on the selection of a neutral arbitrator, which the resident or his or her representative and the facility agree upon, and the venue is convenient to both parties.

Finally, the retention of a copy of the signed agreement for binding arbitration and the arbitrator's final decision enables CMS to fully evaluate quality of care complaints that are addressed in arbitration and assess the overall impact of the agreement related to the safety and quality of care provided in long-term care facilities.

Definitions

- **Arbitration**
 - A private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.
- **Binding Arbitration Agreement**
 - A binding agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The decision is final, can be enforced by a court, and can only be appealed on very narrow grounds.

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It is important to understand the following legal definitions:

Arbitration: a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.

Binding Arbitration Agreement is a binding agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The decision is final, can be enforced by a court, and can only be appealed on very narrow grounds.

Definitions

- **Pre-dispute binding arbitration agreement (pre-dispute arbitration agreement or pre-dispute agreement):**
 - A binding agreement to resolve a future unknown dispute with an arbitrator prior to any issue or dispute arising.
- **Post-dispute binding arbitration agreement (post-dispute arbitration agreement or post-dispute agreement):**
 - A binding agreement is signed after the circumstances of the dispute have occurred to resolve the dispute with an arbitrator.
- **Convenient venue**
 - Convenient Venue is a location, where an arbitration proceedings is held, which should be agreed upon and suitable to both parties.

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There are two types of arbitration agreements:

1. Pre-dispute arbitration agreement is to resolve a future unknown dispute with an arbitrator prior to any issue or dispute arising.
2. Post-dispute arbitration agreement is to sign after the circumstances of the dispute have occurred.

Convenient Venue: a location in which to carry out arbitration proceedings which should be agreed upon and suitable to both parties.

Definitions

- **Arbitrator**
 - Arbitrator is a third party who resolves a dispute between others by arbitration and pursuant to an arbitration agreement. Arbitrators are decision makers, with procedures set by the arbitration agreement and state law, except they may not be required to follow federal or state rules of evidence and their decisions may not be reviewable by a court absent extraordinary circumstances
- **Neutral Arbitrator**
 - Neutral Arbitrator must be an impartial or unbiased third party decision marker, contracted with, and agreed to by both parties to resolve their dispute

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It is important to clearly understand the role and function of a arbitrator as well as a neutral arbitrator.

Arbitrator: a third party who resolves a dispute between others by arbitration and pursuant to an arbitration agreement. Arbitrators are decision makers, with procedures set by the arbitration agreement and state law, except they may not be required to follow federal or state rules of evidence and their decisions may not be reviewable by a court absent extraordinary circumstances

Neutral Arbitrator: an impartial or unbiased third party decision marker, contracted with, and agreed to by both parties to resolve their dispute.

Guidance: *Arbitration Overview*

- Parties subject to arbitration give up their **right** to have some or all claims heard in court.
- Use of a binding arbitration agreement must be **voluntary** and must be clearly communicated.
- The quality of care received by the resident is **not impacted** by a decision to enter into or not to enter into an arbitration agreement
- The agreement **must be explained** so that the resident or his or her representative understands the terms of the agreement, and understands that they are giving up their right to litigation in a court proceeding.
- It is also important that facilities clarify when a signature is used to acknowledge understanding, when it indicates consent to enter into an agreement, or is used for both.

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Over the years, long-term care facilities and residents have used arbitration to resolve many disputes. Parties subject to arbitration give up their right to have some or all claims heard in court.

Concerns have been raised about the fairness and transparency related to these agreements. It is important that the arbitration process is TRANSPARENT.

Therefore, the use of a binding arbitration agreement must be voluntary and must be clearly communicated to the residents or their representatives as optional and not a requirement.

Whether residents or their representatives choose to enter into an agreement, or not, the quality of care received by the resident is not going to be impacted.

In addition, the agreement must be explained so that the resident or his or her representative understands the terms of the agreement, and understands that they are giving up their right to litigation in a court proceeding.

It is also important that facilities clarify when a signature is used to acknowledge understanding, when it indicates consent to enter into an agreement, or is used for both.

Guidance: Requirements for Arbitration Agreements - Transparency in the Arbitration Process

Surveyors:

- **should** determine how the facility ensures residents or their representatives understood and acknowledged the terms of the binding arbitration agreement.
- **must** verify through interview and record review, that the resident or their representative understood what they were signing.
- **determine** how the facility ensures residents or their representatives are made aware of arbitration agreements which are embedded within another document
- **obtain** copies of any documents or agreements that including information about arbitration

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During investigation, surveyors must verify through interview and record review that the resident or their representative understood what they were signing. In situations where the resident may have cognitive impairment, surveyors should refer to the medical record to identify the resident's health care decision-making capacity at the time the agreement was offered, explained, and entered into.

Surveyors should also obtain copies of any documents or agreements that including information about arbitration. For example, if a facility's admission agreement has a paragraph referencing arbitration, but also has a separate arbitration agreement, the survey will need to examine both documents to ensure compliance.

Guidance: F848

- Facilities should make reasonable efforts to ensure that the arbitration agreement provides for the selection of an arbitrator who is impartial, unbiased, and without the appearance of a conflict of interest.
- The binding arbitration agreement must allow for the selection of a venue that is suitable in meeting the needs of both the resident or his or her representative, and the facility.
- The venue must be agreed upon by both parties.
- When a dispute is resolved through arbitration, facilities are expected to retain copies of the following for 5 years:

These records must be made available for review to surveyors upon request.

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In addition to facilities making a reasonable effort to ensure that the arbitration agreement provides for the selection of an arbitrator who is impartial, unbiased, and without the appearance of a conflict of interest. Facilities may put forward suggestions for the use of specific arbitrators for residents (or their representatives) to select. Where the parties are unable to reach an agreement on a neutral arbitrator, the parties should consult the Federal Arbitration Act, 9 U.S.C. §5, and/or applicable state law.

The binding arbitration agreement must allow for the selection of a venue that is suitable in meeting the needs of both the resident or his or her representative, and the facility. Convenience for the resident may be determined by his or her needs in terms of ability to get to the venue. The venue must be agreed upon by both parties.

When a dispute is resolved through arbitration, facilities are expected to retain copies of the following for 5 years. Specifically the signed binding arbitration agreements and final decisions final decisions. These records must be made available for review to surveyors upon request.

NOTE: It is important for surveyors to focus on the record retention requirement, not the content of arbitration final decisions

Interviews

Resident and/or his or her Representative

Resident Council/ Family Council

Facility staff

State Long-Term Care Ombudsman (if available)

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Surveyors should verify with the facility whether arbitration agreements are used to resolve disputes.

If so, determine compliance with F847 and F848 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long-Term Care Ombudsman, facility staff; and record review, which includes reviewing the agreement and other relevant documentation.

Record Review

F847

- The binding arbitration agreement:
 - clearly states that the resident or his or her representative is not required to enter into the agreement as a condition of admission to the facility, or as a requirement to continue to receive care.
 - does not include language, which prohibits or discourages the resident or representative from communicating with federal, state, or local officials.
 - was explained in a form, manner and language that the resident or his or her representative understands.

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Here are a few examples of what to look for when reviewing resident records under F847.

Review the binding arbitration agreement, any other pertinent information relevant to the selection of the arbitrator and venue as well as the arbitrator's final decision after resolution of a dispute (if applicable).

Record Review

F848

- Is there evidence that the resident or his or her representative were provided with the opportunity to select a neutral arbitrator?
- Is there evidence that the resident or his or her representative were provided with the opportunity to select a convenient venue?
- Is there evidence the facility retained a copy of the signed agreement for binding arbitration and the arbitrator's final decision, after the resolution of a dispute through arbitration for five (5) years?

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Here are a few examples of what to look for when reviewing resident records under F848.

Review the binding arbitration agreement, any other pertinent information relevant to the selection of the arbitrator and venue as well as the arbitrator's final decision after resolution of a dispute (if applicable).

F847 Key Elements of Noncompliance

The facility *failed to*:

- **Explain** the terms of the agreement to the resident or his/her representative in a form and manner that he/she understands.
- **Inform** the resident or his/her representative they are not required to enter into a binding arbitration agreement or they have the right to rescind or termination the agreement within 30 calendar days.

The agreement itself *failed to*:

- **Prohibit or discourage** the resident or his/her representative from communicating with federal, state, or local officials,
- **Contain** language which clearly informs the resident or his/her representative they are not required to sign the agreement as a condition of admission to or as a requirement to continue to receive care at the facility.

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After the completion of investigation, surveyors should look for the key elements in order to determine the non-compliance at F847.

F848 Key Elements of Noncompliance

The facility *failed to*:

- **Ensure** that the agreement provides for the selection of a venue that is convenient, for the selection of a neutral arbitrator.

For disputes resolved by arbitration, the facility *failed to*:

- **Retain** a copy of the signed agreement for binding arbitration and the arbitrator's final decision (for disputes resolved by arbitration) after the facility and a resident or their representative resolve a dispute through arbitration for five (5) years
- **Refuse** to make the signed agreement or final decision available for inspections upon request by CMS or its designee.

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After the completion of investigation, surveyors should look for the key elements in order to determine the non-compliance at F848.

Surveyors should always refer to the regulations and guidance to determine they are citing the correct F tag for any identified noncompliance.

Severity Level

Immediate Jeopardy (Refer to Appendix Q)

Severity level 3 Harm and Actual Harm

No Actual Harm severity level 2, that is not IJ

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When determining severity, surveyors may use the reasonable person concept . Severity Level 1 does not apply for this regulatory requirement.

When citing immediate jeopardy, the surveyor's investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial injury or harm, or caused actual serious psychosocial injury or harm, and required immediate action to prevent further serious psychosocial injury or harm from occurring or recurring. (Refer to the Psychosocial Severity Outcome Guide).

Plan of Correction

Plan of Correction:

- New or revised arbitration agreements provided to residents
- Informed and explained the terms of the new agreement
- All arbitration agreements allow for the selection of a neutral arbitration and convenient venue
- A process to ensure records are retained for 5 years

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For F847, Based on CMS 2567, surveyors identified systemic noncompliance, indicating a complete disregard or unawareness of the requirements, such as the standard use of arbitration agreements containing language which violates the requirements at F847, and the facility has made no attempt to explain arbitration agreements to residents. So, when reviewing the plan of correction (POC), surveyors must review carefully to ensure the new/revised arbitration agreement in use complies with the requirement of F847 and residents/representatives are informed and offered the new agreement that compliance with the requirement of F847.

For F848, Based on CMS 2567, surveyors identified systemic noncompliance with F848, indicating a complete disregard or unawareness of the requirements, such as routinely making no attempt to work with the resident or representative in selecting a neutral arbitrator or convenient venue. When reviewing the plan of correction (POC), surveyors should ensure that all arbitration agreements allow the selection of a neutral arbitrator or convenient venue as well as a defined process for 5 year record retention.

Congratulations

You have completed this section related to F847 and F848.



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Thank you for listening. If you have questions, please refer to the Arbitration interpretive guidance and/or email the DNH triage mailbox at DNH_TriageTeam@cms.hhs.gov.